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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

SALVADOR MICHAEL FREASE,

Defendant and Appellant.

C078963

(Super. Ct. No. CRF14795)

On March 2, 2015, a jury found defendant Salvador Michael Frease guilty of unlawfully driving or taking a motor vehicle. On appeal, defendant contends the trial court abused its discretion by denying his motion for a mistrial based on a prosecution witness's nonresponsive answer to a question in which the witness suggested defendant had committed domestic violence. He also contends he was denied effective assistance of counsel due to his counsel's failure to object to an erroneous jury instruction. Both of defendant's contentions lack merit. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2013, defendant and Shashani Marcus were living together in a house in Arizona with their daughter.¹ During that period, Shashani borrowed a truck from her aunt, Sacena. Sacena remained the registered owner of the truck. Although both defendant and Shashani drove the truck, defendant often used the truck to get to work.

In early August 2013, defendant and Shashani argued and broke up. Defendant took the truck and left for California. Defendant called Sacena several times to discuss the situation with the truck. During those conversations, defendant attempted to get his belongings back in exchange for returning the truck to Sacena. Sacena ultimately reported her truck as stolen to the Phoenix Police Department and contacted the Department of Motor Vehicles (DMV). A DMV investigator eventually located the vehicle at a farm in Guinda, California.

During cross-examination, prosecution witness Sacena testified that when defendant and Shashani broke up, Shashani did not kick him out; instead, he left on his own accord. When defense counsel asked her how she knew Shashani did not kick him out, Sacena replied, “Because . . . of what she had told me.” When defense counsel repeated, “Based on what she told you,” Sacena replied, “Yes. And she showed me the bruises on her body.” Defense counsel immediately objected and moved to strike. The trial court granted the motion and admonished the jury to not give any weight to stricken answers whatsoever. At the next recess, defense counsel moved for a mistrial on the grounds that Sacena’s reference to defendant’s domestic violence was highly prejudicial. In a hearing on the motion for mistrial, the trial court found that the proper remedy for the witness statement was an admonishment to the jury and denied the motion.

¹ Due to a common surname, we will refer to Shashani Marcus and Sacena Marcus by their first names.

During a hearing on jury instructions, the trial court identified the People's proposed jury instructions on the record to hear any questions, concerns, and objections from the parties. Defense counsel did not object when the trial court stated it would read CALCRIM No. 361 to the jury. After defendant testified, the trial court instructed the jury using CALCRIM No. 361 as follows: "If the defendant failed in his testimony to explain or deny evidence against him, and if he could have reasonably be[en] expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluat[ing] that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove the defendant guilty beyond a reasonable doubt. [¶] If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure." Defense counsel did not object to this instruction.

DISCUSSION

I

Denial Of Mistrial Motion For Witness's Nonresponsive Comment Was Not An Abuse Of Discretion

Defendant contends the trial court committed reversible error in denying his motion for a mistrial. Specifically, he asserts that the prejudice from Sacena's suggestion that he committed domestic violence against Shashani could not be cured by the trial court's admonition or instruction. We disagree.

We review a trial court's denial of a motion for mistrial under the deferential abuse of discretion standard. (*People v. Price* (1991) 1 Cal.4th 324, 428.) Although a witness's volunteered statement may provide the basis for a finding of incurable prejudice, a brief and nonresponsive witness statement can generally be cured by admonishment. (*Ibid*; *People v. Wharton* (1991) 53 Cal.3d 522, 565.) A jury is presumed to have followed an admonition to disregard improper evidence particularly where there is an absence of bad faith. (*People v. Olivencia* (1988) 204 Cal.App.3d

1391, 1404.) Only in an exceptional case can the prejudicial effect from improper witness testimony be incurable by jury admonishment or instructions. (*Ibid.*)

Here, Sacena's brief and nonresponsive suggestion that defendant inflicted bruises on Shashani was not so exceptional that it could not be cured by admonishment. In *People v. Curtis* (1965) 232 Cal.App.2d 859 at page 867, a prosecution witness mentioned the defendant's criminal record on cross-examination. Defense counsel subsequently moved to strike the statement from the record and for a mistrial. (*Ibid.*) The trial court admonished the jury to disregard the statement, but denied the motion for mistrial. (*Ibid.*) We held that the trial court was justified in its denial of the defendant's motion for a mistrial, as striking the criminal record reference was a sufficient remedy. (*Ibid.*) Similarly in this case, when Sacena mentioned Shashani's bruises, the trial court promptly granted the motion to strike and admonished the jury to disregard that statement. There is no reason to believe the jury ignored the trial court's admonishment, especially given that the domestic violence reference was unrelated to the underlying charge.

Defendant has offered nothing to show that the admonishment was insufficient to cure any prejudicial effect of Sacena's nonresponsive mention of Shashani's bruises. Instead, he flippantly states that admonishments to the jury to disregard such statements are a "legal fiction."

Our Supreme Court has held an admonishment may be "sufficient to prevent any prejudice." (*People v. Price, supra*, 1 Cal.4th at p. 428.) We are bound by that principle. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction"].) Accordingly, the admonition to the jury was sufficient to prevent any prejudice to defendant and the trial court did not abuse its discretion in denying the motion for mistrial.

II

Counsel's Failure To Object To Jury Instructions Was Not A Denial Of Right To Effective Assistance Of Counsel

Because defense counsel failed to object to CALCRIM No. 361, any argument of instructional error is forfeited on appeal. (See *People v. Mitchell* (2008) 164 Cal.App.4th 442, 465 [“failure to object to instructional error forfeits the objection on appeal unless the defendant’s substantial rights are affected”].) Recognizing this, defendant contends his right to effective assistance of counsel was violated when his counsel failed to object to the erroneous instruction using CALCRIM No. 361. We disagree.

“Under both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution, a criminal defendant has a right to assistance of counsel.” (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) “[T]he right entitles the defendant not to some bare assistance but rather to *effective* assistance.” (*Ibid.*) To demonstrate ineffective assistance of counsel, a defendant must first show counsel’s performance was deficient because his representation fell below an objective standard of reasonableness under prevailing professional norms. (*In re Avena* (1996) 12 Cal.4th 694, 721.) Second, he must show prejudice flowing from counsel’s performance or lack thereof. (*Ibid.*) Moreover, “a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies If it is easier to dispose of an ineffectiveness claim on the ground of lack of prejudice . . . that course should be followed.” (*Strickland v. Washington* (1984) 466 U.S. 668, 697 [80 L.Ed.2d 674, 699].)

Here, defendant’s ineffective assistance of counsel claim fails for lack of prejudice. CALCRIM No. 361 cautions the jury that defendant’s failure to deny or explain any evidence against him “is not enough by itself to prove guilt,” and “[t]he People must still prove each element of the crime beyond a reasonable doubt.” Because the language in CALCRIM No. 361 preserves the presumption of innocence and explains

the prosecution's burden of proof, there is no prejudice from its introduction to the jury. (*People v. Rodriguez* (2009) 170 Cal.App.4th 1062, 1067; see also *People v. Saddler* (1979) 24 Cal.3d 671, 680 [former CALJIC No. 26.2 does not create an inference of guilt because it cautions the failure of defendant to deny or explain evidence against him does not create presumption of guilt or by itself warrant an inference of guilt, nor relieve the prosecution's burden].) Furthermore, the language of CALCRIM No. 361 allows the jury to draw an adverse inference only if the defendant fails to explain or deny evidence. Presuming that the jury followed the instructions and did not draw an adverse inference when, as defendant contends, he did not fail to explain or deny any evidence against him, there could be no prejudice to defendant.

For the foregoing reasons, there is no merit to defendant's ineffective assistance of counsel claim.

DISPOSITION

The judgment is affirmed.

/s/
Robie, Acting P. J.

We concur:

/s/
Butz, J.

/s/
Duarte, J.